BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

A written opinion of the Supreme Court of Illinois (Rec. 9-13) was rendered November 17, 1942, and is reported in 381 Ill. 337.

II.

Jurisdiction of This Court.

The grounds of jurisdiction of the Court are stated in the foregoing petition for writ of certiorari.

III.

Statement of the Case.

The foregoing petition for writ of certiorari contains a general statement of the case.

The question presented arises wholly on the face of the pleadings. The complaint makes no allegation that the petitioner was in the Regular Army or had accepted any commission in the Regular Army of the United States. After the date of the passage by the Congress of the Selective Service Act and the Soldiers and Sailors Civil Relief Act of 1940, and other acts of Congress to raise and support additional armed forces were adopted, petitioner received his commission, late in the year 1941.

The litigation in the Circuit Court of Cook County was concluded by the final judgment in that Court February 19, 1942. This was after the declarations of war had been voted by the Congress of the United States. The decision

of the Supreme Court of Illinois was on November 17, 1942.

The motions to strike the complaint while admitting the averments of the complaint that petitioner had accepted a commission as Captain in the United States Army, did not admit the allegation that petitioner had ceased to be a resident of Maywood, Illinois, but paragraph 5 of petitioner's motion to strike the complaint or petition for mandamus, appearing at page 6 of the abstract of record filed in the Supreme Court, states that (Rec. 3):

> "Defendant, (petitioner) by this motion to strike does not admit the allegations in (pars.) 6 and 7 of the petition alleging that this (petitioner) has ceased to be a resident of Maywood and reserves the right to raise an issue in respect thereto".

The order of the Circuit Court of Cook County overruling the motion to strike the petition for mandamus was entered February 4, 1942, (page 7, Abstract of Record in Supreme Court) (Rec. 3); petitioner having elected to stand by his motion to strike the petition for mandamus, the Circuit Court entered its final judgment granting the writ of mandamus on February 19, 1942.

It therefore, is an admitted fact that judgment declaring petitioner's office as Police Magistrate of the Village of Maywood vacant, was entered after the historical assault on Pearl Harbor, and the United States was engaged in a war of unprecedented magnitude and at a time when the future existence of the United States of America was at stake.

IV.

Specification of Errors.

1. The Supreme Court of Illinois erred in holding that where a civilian holds an office under the authority of the state, his office becomes *ipso facto* vacant upon and because

of his acceptance of a commission in the United States Army (other than the Regular Army).

2. The Supreme Court of Illinois erred in holding that when petitioner accepted a commission in the armed forces of the United States, he thereby automatically vacated his office as Police Magistrate in the Village of Maywood, Illinois.

3. The Supreme Court of Illinois erred in holding that the acceptance of a commission in the armed forces of the United States is the acceptance of an office of honor or profit under the Federal Government within the meaning and application of Section 3, Article IV of the Illinois State Constitution.

4. The Supreme Court of Illinois erred in affirming the judgment of the Circuit Court of Cook County, in this case.

5. The Supreme Court of Illinois erred in failing to reverse the judgment entered by the Circuit Court of Cook County in this case.

V.

Argument.

It is apparent from the bare statement of the question involved in this case, that the Supreme Court of Illinois has by the construction it has placed on the provision of Section 3, Article IV of the State Constitution, considered it paramount to the provisions of the Constitution of the United States and Acts of Congress passed pursuant thereto; and has ignored the plain provision of the Federal Constitution and Federal Statutes as the supreme law of the land.

The preamble to the Constitution of the United States recites that it is ordained and adopted to, among other things,

> "provide for the common defense" and "promote the general welfare".

Article VI, Paragraph 2 of the Constitution of the United States provides:

> "This Constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

It is, therefore, obvious that the supreme law of the land cannot be impaired by any state, whether such impairment is found in the State Constitution or in the Acts of the State Legislature. It adds nothing to the power of the state to assert its right under a provision in its Constitution rather than an Act of its state legislature. Unless a provision in a state constitution can be construed to be in harmony with the supreme law of the land, it is not valid.

Article I, Section 8 of the Federal Constitution provides that:

> "The Congress shall have power
> to provide for the common defense and general welfare of the United States;
> to declare war;
> to raise and support armies;
> to provide and maintain a navy;
> to make rules for the Government and regulation of the land and naval forces;
> to provide for calling forth the militia to * * * suppress insurrections and repel invasions;
> to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be in the service of the United States;
> make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

Article II, Section 2 of the Federal Constitution provides that:

> "The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several states when called into the actual service of the United States."

By the first section of Article II of the Federal Constitution it is provided:

> "The executive power shall be vested in a president of the United States of America."

By Article IV, Section 4 of the Federal Constitution it is provided:

> "The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion."

There is, therefore, no want of power or authority in the President and the Congress of the United States to take every action and do everything, in their judgment deemed necessary, appropriate or expedient to protect, further and carry out the objects and purposes expressed in the Federal Constitution. And it will certainly not be disputed that in the exercise of these powers and functions the National Government will protect the individual citizen in his guaranteed rights, privileges and immunities. It will protect him in his title to an office under state authority just the same as it will protect him in his title to property under like authority; in fact, his office is a property right.

It must also be admitted that the Federal Government will not, under its constitutional powers, permit any state of the Union to weaken, or impair, or strike down, or interfere with the nation's supreme right, power and authority to raise an army and prosecute a war.

Before this case was decided in the Circuit Court of Cook County, Illinois the Congress of the United States

had passed many statutes in aid of the prosecution of the war it had declared against foreign nations. Among them was the Act commonly known as the "Conscription Act" or the "Draft Law" and more particularly defined as

> "The Selective Training and Service Act of 1940" U. S. C. A. Title 50—War, Cumulative Annual Pocket Part 1941, page 88, Section 308,

which was adopted by the 76th Congress and approved by the President on September 16, 1940, and is entitled

> "An Act to provide for the common defense by increasing the personnel of the armed forces of the United States and providing for its training."

And by paragraph (b) of Section 8 (308) it is provided:

> "In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for re-employment within forty days after he is relieved from such training and service,—
>
> "(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;
>
> "(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;
>
> "(C) if such position was in the employ of any State or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should be restored to such position or to a position of like seniority, status, and pay."

It will be noted that by subparagraph (C) of paragraph (b) of said Section 8, in as respectful language as could

be employed to still express its positive conviction that if a civilian was in the employ of any state or political subdivision thereof "it is hereby declared to be the sense of the Congress that such person should be restored to such position or to a position of like seniority, status, and pay" at the end of his term of service in the armed forces.

It is also to be remarked that the legislative branch of the state government of the State of Illinois, following the adoption of the Selective Training and Service Act of 1940, and by other war measures, approved and announced it to be the public policy of the state to approve the action of the Federal Government. On July 17, 1941 an act of the General Assembly of the State of Illinois was approved, known and called by the short title "Service Mens Employment Tenure Act (Ill. Rev. Stat. State Bar Ass'n. Ed. 1941, Page 3022, Secs. 29 to 35 of Chap. 126½) entitled "Soldiers and Sailors"; 1941 Session Laws. Vol. 1, page 1202. By Section 2 of this Act the Legislature of Illinois declared the public policy of the State as a guide to the acts, interpretation and application, and states:

> "As a constituent commonwealth of the United States of America, the State of Illinois is dedicated to the urgent task of strengthening and expediting the national defense under the emergent conditions which are threatening the peace and security of this nation. It is the considered judgment of the General Assembly that the wage earners of Illinois who respond to their country's call to service in this time of crisis, are deserving of every protection of their employment status which the law may afford, and that repetition of the regrettable experience existing after the great war of 1917-1918, wherein returning service men were subjected to serious discrimination with regard to tenure and other rights of employment, must be avoided, since any form of economic discrimination against returning service men is a serious menace to the entire social

fabric of the United States of America and the State of Illinois.

"By safeguarding the employment and the rights and privileges inhering in the employment contract, of service men, the State of Illinois encourages its workers to participate to the fullest extent in the national defense program and thereby heightens the contribution of our State to the protection of our heritage of liberty and democracy."

Then in the next section the Illinois Legislature defined "persons in the military service" as follows:

"The term 'persons in the military service', as used in this Act, shall include the following persons and no others: All members of the Army of the United States, the United States Navy, the Marine Corps, the Coast Guard and all members of the State Militia called into the service or training of the United States of America. The term 'military service', as used in this Act, shall signify Federal service or active duty with any branch of service heretofore referred to as well as training or education under the supervision of the United States preliminary to induction into the military service.

"The foregoing definitions shall apply both to voluntary enlistment and to induction into service by draft or conscription."

And in Section 5 of the Act provided:

"Any person who is restored or seeks to be restored to a position in accordance with the provisions of this Act, shall be considered as having been on furlough or leave of absence during his military service, and shall be so restored without loss of seniority."

It will be noted that the Illinois Legislature recognized the regrettable experience existing after the great war of 1917-1918, wherein "returning service men were subjected to serious discrimination with regard to tenure and other rights of employment," and stated that the same must be avoided in the present national calamity and gave its reasons. It will also be noted that "tenure" was one of the rights which the legislature expressed its desire to protect.

It is also apparent that the legislature was making no reference to members of the Regular Army but was referring to those that might be included in the United States Army, Navy or other armed forces.

The Congress has always recognized the difference between the "Regular Army," and the "United States Army" or the "Army of the United States." It is provided by Chapter 1, Section 2, Title 10 U. S. C. A.—Army—as amended December 13, 1941, appearing in the pocket supplement of the U. S. C. A., page 3, that

> "The Army of the United States shall consist of the Regular Army,
> the National Guard of the United States,
> the National Guard while in the service of the United States,
> the officers reserve corps,
> the organized reserves, and
> the enlisted reserve corps,
> and shall include persons inducted into the land forces of the United States under Sections 301, 318 of Appendix to Title 50."

The United States Army, therefore, consists of the Regular Army and all of these other forces created and organized as a part of the armies of the United States. Like provisions were made for the creation and maintenance of the United States Navy.

There is in this case, therefore, no question of whether or not a member of the Regular Army could at the same time hold civilian office under the authority of a state. There is no allegation or claim that petitioner is a member of the Regular Army.

There are a multitude of other acts of Congress, regulations and proclamations recognizing the same distinction and dealing with the enlargement of the armed forces to meet the unprecedented existing national emergency; but the foregoing are illustrative and sufficiently definite to

establish the distinction between the Regular Army and the other armed forces of the nation.

Decisions in Direct Conflict With the Decision of the Illinois Supreme Court in This Case.

At the time this case was decided in the Supreme Court of Illinois there were numerous decisions by the courts of other states which, if followed and applied, would have compelled the court to hold that the complaint or petition for mandamus filed in this case was insufficient and should have been dismissed.

Among the decisions holding the contrary view of that expressed by the Supreme Court of Illinois in this case are

State v. *Grayston* (Missouri), 163 S. W. (2d) 335;

McCoy v. *Board of Supervisors of Los Angeles County* (California), 114 Pac. Rep. (2d) 569;

State of Louisiana v. *Joseph* (Louisiana), 78 So. 663;

Carpenter v. *Shepherd* (Texas), 145 S. W. (2d) 562;

In re Advisory Opinion to the Governor, Supreme Court of Florida, en Banc, 8 So. Rep. (2d) 26;

Later Advisory Opinion to the Governor by the Supreme Court of Florida, 9 So. Rep. (2d) 172.

In each of the above cited cases, the court of last resort in the state of residence of the citizen involved, held exactly contrary to the decision of the Illinois Supreme Court in this case. In each of them, a person holding an office of honor or profit under the authority of the State Government, accepted a commission as an officer in the Army of the United States. There was the same provision in the state constitution that appears in the Illinois constitution, prohibiting any person from holding office of honor or profit under the authority of the state, and at the same time

holding an office of honor or profit under the Federal Government.

In each of the cases cited, the court of last resort held a commission in the Armed Forces of the United States was not an office of honor or profit within the meaning of the state constitution using that phrase.

We respectfully submit that a definition of the rank of a member of the Armed Forces of the nation does not imply an office of honor or profit under the Federal Government, as the term, "honor or profit," is used to prohibit the holding of incompatible offices by the same person.

The underlying reason for the provision in the constitutions of the several states is to prohibit the holding by one person of two offices which are incompatible. In all of the states, exceptions appear where the legislatures have definitely provided that the holding of certain offices is not incompatible with the holding of another office. Even the Illinois constitution permits a Justice of the Peace to be a member of the General Assembly, in the same section that the Supreme Court of Illinois relies upon for its decision in this case. The Illinois constitution expressly excepts the office of Justice of the Peace as one incompatible with that of a member of the General Assembly.

By the Illinois law, a Police Magistrate has the same powers, and exercises the same functions, and is in all respects the same character of officer, as a Justice of the Peace, the only difference being that the one is a city elective office and the other is a town (township) elective office; the same jurisdiction is given to Police Magistrates as to Justices of the Peace; there is no difference in the office of Police Magistrate and Justice of the Peace in Illinois except the territory in which the officer is elected.

It is an unwarranted extension of the definition of the term "honor or profit" to say that it applies to a commission in the Army of the United States.

It cannot be claimed that there is anything incompatible with the discharge of the duties of a captain in the United States Army and the discharge of the duties of a Police Magistrate in civil life. Of course, as held by the courts of other states, in the decisions above cited, there is a leave of absence during the time the person holding an office under authority of the state is actually engaged in his duties as a commissioned officer in the Armed Forces; but that does not mean that his office *ipso facto* becomes vacant; and that he automatically resigned from the office by accepting a commission in the Army.

The record in this case also shows that an attempt was made to get the Supreme Court of Illinois to review the decision in this case and abundant opportunity afforded to that end. The record shows (page 19) that the rules of the Illinois Supreme Court allow a petition for rehearing to be filed within twenty-five days from the date of the opinion; and that notice of intention to file it shall be given within fifteen days after the opinion was filed.

On page 17 of the record it appears, by a communication from the Clerk of the Supreme Court, that the necessary number of copies of a petition for rehearing, with proof of service, were received on December 11, 1942, which was twenty-four days after the date the opinion had been filed; but that they were returned because the notice of intention to file them had not been given within fifteen days.

At page 18 of the record appears the letter written by the attorney for petitioner, enclosing a motion for leave to file the petition for rehearing instanter, and reciting that the necessary copies had been deposited with the Clerk within the twenty-five day period.

It further appears at page 20, *et seq.* of the record, that affidavit was filed in support of the request to file the peti-

tion for rehearing instanter, together with a copy of the petitions which had been deposited with the Clerk, and the presentation of this motion to the Court.

Also, at page 29, *et seq.*, there appears a motion filed by the President of the Illinois State's Attorneys Association, asking leave to file petition for rehearing, and brief and argument in support thereof, *amicus curiae*.

Then, on pages 33 and 34 of the record, appear the orders of Illinois Supreme Court denying the request and motion of petitioner's counsel and of the President of the Illinois State's Attorneys Association to file petition for rehearing and be heard in support thereof.

Under the language of the opinion of the Illinois Supreme Court as to the questions which had been presented and argued on the appeal, it is obvious that the Court denied the opportunity for petitioner's counsel or the President of the Illinois State's Attorneys Association, to acquaint the Court with the contrary holdings of the courts of last resort of other states on the question involved in this petition for *certiorari*.

It is, therefore, apparent that the Supreme Court of Illinois has never given due consideration to the question here presented.

We further respectfully submit that no decision in any court at any previous period in American history is a precedent on the question involved in this case under existing national and international conditions.

The present emergency is unprecedented in American history; the safety, security and preservation of the National Government is jeopardized and is at stake in the present World War. All courts will take judicial notice of the fact that this nation is engaged in a struggle for its life and future existence. It is not a time for the citizen

to exercise a choice, or entertain an ambition to be a soldier. His freedom of action is the same whether he be the lowest private in the ranks or a General in command of the Armies. There may be some difference if he has chosen the life of a soldier as a profession by becoming a member of the Regular Army. That distinction is recognized by the Congress and by all decisions of the courts on the subject. A member of the Regular Army, whether an officer or a private, is engaged in a profession, as has been repeatedly held wherever the question was involved. But that question is not involved here, because there is no claim that petitioner is a member of the Regular Army.

The ultimate question involved in this case is whether or not a citizen shall be penalized because he is a patriot.

If the common prayer for an early peace is realized, civil offices held by members of the Armed Forces, where the term for which they were elected has not expired, should be open, not vacant, for them to resume and enjoy the title, right and privilege of filling out their term of office to which they were elected, which may remain after their honorable discharge from the Army of the United States.

The decision of the Illinois Supreme Court in this case deny him that title, right and privilege.

During the time the civilian serves his country as a soldier, he should have immunity against the loss of his job or his office in civilian life, whether in private employment or to which he had been chosen by the electors of his residence.

The sacrifice which the citizen makes in responding to his country's call in the existing unprecedented emergency should not include the forfeiture of his civil rights, which he had when he entered upon his service as a soldier.

We respectfully submit that the decisions of the courts of last resort of the sister states of Missouri and California

and Louisiana and Texas and Florida are correct; and that the decision of the Supreme Court of Illinois in this case is erroneous and should be reversed.

Respectfully submitted,

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